(2)

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

No. 94-657

In The

Supreme Court of the United States

October Term, 1994

ROBERT LEE ZIMMERMAN,

Petitioner,

vs.

BISHOP ESTATE, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE RICHARD MORRY*
MICHAEL L. FREED
CHERYL A. NAKAMURA
RUSH MOORE CRAVEN SUTTON
MORRY & BEH
745 Fort Street
20th Floor, Hawaii Tower
Honolulu, Hawaii 96813
(808) 521-0400

Counsel for Respondents Bishop Estate, et al.

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

26 pp

QUESTION PRESENTED

Whether Honolulu police officers properly arrested Petitioner when he refused to leave Respondent Bishop Estate's private property after being given an oral warning to do so.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINION BELOW 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

A. The Decision Below is Not in Conflict With Any Other Decision of the Ninth Circuit, Any Other Circuit, or Any Decision of a State Court of Last Resort 4

B. The Ninth Circuit Correctly Followed Established Precedent in Applying the Law of Trespass to Squatters and Their "Guest", Petitioner Zimmerman, Who After Several Written and Oral Requests to Do So Refused to Vacate the Property of Another 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Amezquita v. Hernandez-Colon, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) 4, 5

Illinois v. Rodriguez, 497 U.S. 177 (1990) 6

State v. Dias, 62 Haw. 52, 609 P.2d 637 (1980) 4

United States v. Matlock, 415 U.S. 164 (1974) 5, 6

United States v. Ruckman, 806 F.2d 1471 (10th Cir. 1986) 4, 5

United States v. Taketa, 923 F.2d 665 (9th Cir. 1991) 5

STATUTES

42 U.S.C. § 1983 2

No. 94-657

In The

Supreme Court of the United States

October Term, 1994

ROBERT LEE ZIMMERMAN,

Petitioner,

vs.

BISHOP ESTATE, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents BISHOP ESTATE; BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, OSWALD STENDER, MYRON THOMPSON AND MATSUO TAKABUKI; ELAINE DUNG; PETER BERTULFO AND PAUL CATHCART (UNSERVED) pray that the Petition for Writ of Certiorari be denied on the ground that this case does not meet any of the criteria for review by this Court.

OPINION BELOW

The Court of Appeals for the Ninth Circuit affirmed in pertinent part the District Court's grant of Summary Judgment against claims of Petitioner (Plaintiff below) for wrongful arrest brought pursuant to § 42 U.S.C. § 1983 and related pendent State causes of action. Petitioner's Motion for Reconsideration and for hearing *en banc* were denied, and this appeal ensued.

STATEMENT OF THE CASE

The District Court found the underlying facts of this case to be undisputed and the following history is taken from the unpublished Order entered by District Judge Alan C. Kay on September 3, 1991,[1] which granted Respondent's Motion for Summary Judgment on all issues framed by the First Amended Complaint, and from the published Opinion of the Ninth Circuit. *Zimmerman v. Bishop Estate, et al.*, 25 F.3d 784 (9th Cir. 1994).[2]

Respondent Trustees of the Kamehameha Schools/ Bishop Estate were at all times relevant the owners of a parcel of real property located at Kawailoa on the Island of Oahu, State of Hawaii. A family, the Kanes, moved onto the property without the permission or acquiescence of the Trustees in early 1988.

---

[1] This Order is attached as an Appendix to this Brief in Opposition.

[2] This Opinion is attached as an Appendix to the Petition for Certiorari.

For several months after their presence was discovered, the Trustees through correspondence and personal visits notified the Kane family that they were trespassing and not welcome on the property. Finally, the Trustees notified the Honolulu Police Department of the trespassing situation, and uniformed officers appeared at the site to warn the trespassers to leave the property or face arrest. The Kanes requested and were granted a five day extension of time within which to vacate the property, and subsequently a similar additional one day extension. Rather than vacating the premises on the day promised, the Kane family asked Mr. Zimmerman, then a candidate for public office, to join them.

After the expiration of the one day extension, the uniformed police officers again requested that the Kane family and their "guest" Petitioner Zimmerman vacate the premises or face immediate arrest. Everyone left the property except Mrs. Kane and Mr. Zimmerman. Mrs. Kane and Mr. Zimmerman were taken into police custody, released upon $25.00 bail and charged under state law with criminal trespassing in the second degree.

Following the arrests, the Kane family moved back on the property prompting the Trustees to bring an action for ejectment in state court. That action resulted in a confirmation of the Trustees' ownership and the issuance of an ejectment order through which the Kanes were moved from the premises. The criminal trespass proceedings against Mrs. Kane and Petitioner Zimmerman were thereafter dropped by the prosecutors.

REASONS FOR DENYING THE WRIT

A. The Decision Below is Not in Conflict with Any Other Decision of the Ninth Circuit, Any Other Circuit or Any Decision of a State Court of Last Resort.

Zimmerman's petition presents no issue meriting this Court's review. Petitioner does not even attempt to argue that a conflict exists between the various circuits on any constitutional issues which Petitioner alleges were trampled by his trespassing arrest. Indeed, he could not do so as both circuits which have addressed the issue of a squatter's right to privacy have held that Fourth Amendment rights of squatters and trespassers are not abridged by their arrest because they have no reasonable expectation of privacy. *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976) (squatter); *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) (trespasser on federal land).

The State of Hawaii adhered to this general rule in *State v. Dias*, 62 Haw. 52, 609 P.2d 637 (1980), but found that search and seizure privacy rights could attach where the owner (State of Hawaii) had long acquiesced in the squatter's presence.

The uncontroverted facts in the instant case demonstrate that the Bishop Estate repeatedly demanded that the trespassing Kane family remove themselves from the premises and no issue of acquiescence was presented in opposition to Respondents' Motion for Summary Judgment in the District Court.

B. The Ninth Circuit Correctly Followed Established Precedent in Applying the Law of Trespass to the Squatters and their "Guest", Petitioner Zimmerman, Who After Several Written and Oral Requests to Do So, Refused to Vacate the Property of Another.

The Ninth Circuit Opinion properly dealt with Petitioner's Fourth Amendment claims by following well-established precedents. That Circuit had earlier held that a party invoking Fourth Amendment protection must have a subjective expectation of privacy that is objectively reasonable. *United States v. Taketa*, 923 F.2d 665 (9th Cir. 1991).

Mrs. Kane's expectation of privacy was found not to be objectively reasonable. In this action the Kane family had requested permission to reside on the property, which request was denied. Then, in a series of written and oral requests they were advised they were trespassing and asked to vacate the premises. As an invitee of the Kanes, Petitioner Zimmerman had no greater right to be on the property than did the Kanes. Accordingly, neither the Kanes nor Mr. Zimmerman's Fourth Amendment rights were violated by the arrests. *Amezquita v. Hernandez-Colon*, 518 F.2d 8 (1st Cir. 1975), *cert. denied*, 424 U.S. 916 (1976); *United States v. Ruckman*, 806 F.2d 1471 (10th Cir. 1986) (citing *Amezquita* with approval).

Even if we assume, arguendo, that Petitioner Zimmerman had a privacy expectation that was reasonable, no constitutional rights were violated because the arrest was lawful and the Ninth Circuit so found. On the date of the arrest the Bishop Estate had given the police officers *Matlock* permission to go on the property. Under such

circumstances no search warrant was necessary and Petitioner's incessant argument as to the lack of "exigent circumstances" is irrelevant. *See United States v. Matlock*, 415 U.S. 164 (1974).

Finally, even if we further assume that the Bishop Estate did not have ownership authority over the premises (which it clearly did), the arrests were still valid because the police officers at the time of their entry onto the property reasonably believed and relied upon the evidence of ownership provided them by the Bishop Estate representatives. *See Illinois v. Rodriguez*, 497 U.S. 177, 188-89 (1990).

It is undisputed that the Bishop Estate is and was the lawful owner of the property. A final order confirming ownership and ejecting the Kane family from the premises was issued by the Circuit Court of the First Circuit on January 4, 1990, prior to the filing of these proceedings on February 8, 1990 by Petitioner Zimmerman.

CONCLUSION

There is nothing in the Petition by way of fact or argument that warrants review by this Court. The Petition for Writ of Certiorari should be denied.

DATED: Honolulu, Hawaii, November 7, 1994.

Respectfully submitted,

GEORGE RICHARD MORRY*
MICHAEL L. FREED
CHERYL A. NAKAMURA
RUSH MOORE CRAVEN SUTTON
MORRY & BEH
745 Fort Street
20th Floor, Hawaii Tower
Honolulu, Hawaii 96813

Counsel for Respondents
Bishop Estate, et al.

*Counsel of Record

APPENDIX

RUSH MOORE CRAVEN SUTTON
MORRY & BEH

MICHAEL L. FREED 1450-0
CHERYL A. NAKAMURA 3007-0
PATRICIA S. ZELL 5138-0
200 Hawaii Tower
745 Fort Street
Honolulu, Hawaii 96813-3862
Tel. No. 521-0400

Attorneys for Defendants
BISHOP ESTATE, BISHOP ESTATE TRUSTEES, ELAINE DUNG, PETER BERTULFO, and PAUL CATHCART (Unserved)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ROBERT LEE ZIMMERMAN, Plaintiff, vs. BISHOP ESTATE, et al., Defendants.	Civ. No. 90-00086 ACK ORDER GRANTING DEFENDANTS BISHOP ESTATE; BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, OSWALD STENDER, MYRON THOMPSON AND MATSUO TAKABUKI; ELAINE DUNG; PETER BERTULFO AND PAUL CATHCART'S (UNSERVED) MOTION FOR SUMMARY JUDGMENT FILED APRIL 29, 1991 (Filed Sept. 03, 1991)

ORDER GRANTING DEFENDANTS BISHOP ESTATE; BISHOP ESTATE TRUSTEES WILLIAM RICHARDSON, HENRY PETERS, OSWALD STENDER, MYRON THOMPSON AND MATSUO TAKABUKI; ELAINE DUNG; PETER BERTULFO AND PAUL CATHCART'S (UNSERVED) MOTION FOR SUMMARY JUDGMENT FILED APRIL 19, 1991

Defendants Bishop Estate, Bishop Estate Trustees, Elaine Dung, Peter Bertulfo, and Paul Cathcart's (unserved) Motion for Summary Judgment came on for hearing at 1:30 P.M. on July 29, 1991, before The Honorable Alan C. Kay, with Michael L. Freed, Esq. and Patricia S. Zell, Esq. present on behalf of Defendants Bishop Estate, Bishop Estate Trustees William Richardson, Henry Peters, Oswald Stender, Myron Thompson and Matsuo Takabuki, and Elaine Dung, Peter Bertulfo, and Paul Cathcart (unserved) (collectively "KS/BE"); Lawrence D. Kumabe, Esq., present on behalf of the City and County of Honolulu Defendants ("City and County"); and Robert Lee Zimmerman ("Zimmerman"), present on behalf of himself, the Pro Se Plaintiff.

The Court having heard oral arguments, and considered the memoranda and exhibits of all parties, hereby enters the following Order Granting Defendants Bishop Estate, Bishop Estate Trustees William Richardson, Henry Peters, Oswald Stender, Myron Thompson, and Matsuo Takabuki, and Elaine Dung, Peter Bertulfo, and Paul Cathcart's (Unserved) Motion For Summary Judgment, Filed on April 29, 1991.

PROCEDURAL SUMMARY

This lawsuit was filed on February 8, 1990 by Robert Lee Zimmerman against Defendants Bishop Estate, Bishop Estate Trustees, Elaine Dung, Frank Fasi, City and County of Honolulu, Douglas Gibb, Harold Kawasaki, P. Bertulfo, Tim Liu, Duke Aiona, W. Tedson, and K. Kanishero (sic), arising from Zimmerman's arrest by police officers on November 1, 1988 for trespassing at property located at TMK 1-6-1-003-027 Kawailoa, Waialua, Oahu, Hawaii ("the Property").

On January 11, 1991, Zimmerman moved to amend his complaint; his motion was heard and granted on February 19, 1991; and the Order entered on April 1, 1991. On March 28, 1991, Zimmerman filed his First Amended Complaint. The First Amended Complaint added the following additional defendants:

1) Paul Cathcart;
2) Tedson Koja;
3) Captain B. Correa;
4) Lt. L. Wong;
5) Sgt. W. Cambra;
6) Sgt. K. Luke;
7) Sgt. T. Hirayama;
8) Officer G. Williams;
9) Officer G. Goeas;
10) Officer G. Nihipali;
11) Officer J. Keanu;
12) Officer G. Witt.

The First Amended Complaint alleged the following causes of action:

Count I:	Violation of 42 U.S.C. § 1983;
Count II:	Conspiracy to violate 42 U.S.C. § 1983;
Count III:	False arrest;
Count IV:	False imprisonment;
Count V:	Malicious prosecution;
Count VI:	Assault and battery;
Count VII:	Excessive force;
Count VIII:	Negligent and intentional infliction of emotional distress.

DISCUSSION

A. Standard for a Motion for Summary Judgment

Pursuant to *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986):

> [T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case

with respect to which she has the burden of proof. . . .

Zimmerman, as the plaintiff and non-moving party faced with a properly supported summary judgment motion, has the burden of proof at trial and is required to make the *Celotex* showings in his opposition to the motion for summary judgment. He has completely failed to make a showing sufficient to establish the existence of essential elements to substantiate his case.

At the time of the hearing on this summary judgment motion, there were no pending discovery motions before Judge Alan C. Kay or Magistrate Bert S. Tokairin. The Court finds there has been adequate time for discovery. Additionally, the Court, by Minute Order dated June 17, 1991, continued the hearing on this motion in order to allow Plaintiff additional time to complete depositions. Discovery has been ongoing since March of 1990. As KS/BE's memorandum and oral arguments in this Court on July 29, 1991 have demonstrated, Zimmerman has failed to establish the existence of elements necessary to sustain his suit against KS/BE. Therefore, summary judgment in favor of KS/BE and against Zimmerman is appropriate at this time.

B. The Federal Claim-Violation of 42 U.S.C. § 1983

Zimmerman alleged in his First Amendment Complaint that representatives of KS/BE, Elaine Dung (Brown), Paul Cathcart, and the Trustees of Kamehameha Schools/Bishop Estate, entered into a conspiracy with Peter Bertulfo, a Honolulu Police Department officer, and other employees of the City and County of Honolulu to

deprive Zimmerman of his constitutional right to be free from unreasonable search and seizure, a violation of the Fourth Amendment.

However, the facts clearly demonstrate that Zimmerman was the guest of the James and Esther Kane, and that Mr. and Mrs. Kane were trespassers on the Property owned by KS/BE. As the First Circuit Court, State of Hawaii, declared in its January 4, 1990 Findings of Fact, Conclusions of Law and Order Granting Motion for Default Judgment and Summary Judgment for Ejectment in Civil No. 89-0319-02:

> . . . TRUSTEES at all times relevant herein were the fee simple owners of certain real property located at Kawailoa, Waialua, Hawaii, Tax Map Key 1-6-1-003-027 Portion, located at 61-149 and 61-151 Kamehameha Highway, more particularly described in Exhibit A attached to the Complaint . . .
>
> . . . Trustees are the fee simple owners of the Property described in Exhibit A to the Complaint and are entitled to exclusive possession and control of said Property. . . .
>
> . . . Defendants James Kanes and Esther Kane have no right, title, or interest in or to the Property which is the subject of this action.

The evidence demonstrated that Kamehameha Schools/Bishop Estate never acquiesced in the Kane family's presence on the Property. As soon as KS/BE discovered the existence of the Kane family on KS/BE land, Kamehameha Schools/Bishop Estate, through correspondence as early as March 1988, notified the Kane family that they were trespassing and were not welcome on the

Property. This continued through October 1988, at which time KS/BE believed the Kanes had left the Property. Then, after Peter Bertulfo became the caretaker of the Property and it appeared the Kanes had returned, he notified the Kane family, in person, on October 26, 1988 and October 31, 1988, that they were trespassing and were not welcome on the Property. The Kane family refused to vacate the premises.

Zimmerman claims that he was an invited guest of the Kane family on the morning of the arrests. The Kanes had no right to be on the property. Zimmerman, as the guest of the Kane family, had no greater right to be on KS/BE Property than did the Kanes.

KS/BE was not the proximate cause of Zimmerman's alleged injuries. *See generally King v. Massarweh*, 782 F.2d 825 (9th Cir. 1986); *Arnold v. IBM*, 637 F.2d 1350 (9th Cir. 1981). The evidence amply demonstrated that KS/BE exercised no control over the police conduct or decision to arrest Zimmerman or Mrs. Kane. Neither Elaine Dung ("Dung"), KS/BE's representative, nor Peter Bertulfo ("Bertulfo"), the caretaker of the Property, requested the arrest of anyone. Furthermore, the police never consulted with Dung or Bertulfo about making the arrests. It is undisputed that the police consulted with their own counsel before arriving at the decision to arrest the trespassers.

Even if this Court were to find that KS/BE acted under color of state law, which this Court does not find, the actions of the police were proper and the arrest was lawful. On November 1, 1988, the date of the arrest, pursuant to *Matlock* permission, Kamehameha Schools/

Bishop Estate via caretaker Peter Bertulfo had the authority and gave permission to the Honolulu Police Department to go on the Property. *See United States v. Matlock*, 415 U.S. 164 (1974). Under such circumstances, no arrest warrant was necessary. Therefore, Zimmerman's argument about "exigent circumstances" are irrelevant.

The police officers had probable cause to effectuate the arrest, because they saw Zimmerman and Mrs. Kane actively violating Haw. Rev. State. § 708-814, criminal trespass in the second degree. The police gave Zimmerman and the occupants of the structure the opportunity to leave the premises without consequences. However, Zimmerman voluntarily remained, realizing that if he did so that he would be arrested. The arresting police officers followed statutory procedures in making the arrest (Haw. Rev. State. §§ 803-5 and 803-6). Police conduct, according to the uncontroverted evidence, did not violate any of Zimmerman's federal or state civil rights.

Zimmerman had no "expectation of privacy" inside the structure on KS/BE property. Under *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 12 (1st Cir. 1975), recognized in Hawaii case law in *State v. Dias*, 62 Haw. 52, 609 P.2d 637 (1980), neither Zimmerman nor the Kane family had a legal right to occupy the KS/BE Property or to build or occupy structures upon it; "those *faits accomplis* could give rise to no reasonable expectation of privacy."

Because the police arrested Zimmerman pursuant to lawful authority, none of Zimmerman's civil rights were violated. Therefore, this Court grants KS/BE's Motion for summary Judgment as to Count I and Count II of Plaintiff Zimmerman's First Amended Complaint.

C. State Constitutional Claims in Counts I and II

Zimmerman asserts in his first amended complaint that his rights under Article I, Sections 2, 5, 6, and 7 of the Hawaii State Constitution were also violated. If a state constitutional claim is closely tied to the federal claims, this Court may exercise pendent jurisdiction to consider them. *United Mine Workers of American v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

1. Section 2 of Hawaii Constitution

Section 2 provides:

> All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty, and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.

Zimmerman has provided no argument as to why this provision has been violated, and there is nothing in the facts of this case upon which to base a claim under this section.

2. Section 5 of Hawaii Constitution

Section 5 provides:

> No person shall be deprived of life, liberty, or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise

> thereof because of race, religion, sex, or ancestry.

The scope of this section is not necessarily limited by the fourteenth amendment of the federal constitution. *State v. Huelsman*, 60 Haw. 71, 588 P.2d 394 (1979). However, the Court has found no Hawaii cases that interpret this section on facts similar to those in this case. Therefore, the Court looks to the fourteenth amendment of the United States Constitution for guidance. As discussed above, the fourteenth amendment does not provide due process protection in cases such as this, because Zimmerman had no protected property or liberty interest. *See Amezquita, supra. See also State v. Dias*, 62 Haw. 52 (1982) (squatters normally have no reasonable expectation of privacy, even in structures they build, unless landowners acquiesces to the squatting for a considerable period of time).

3. Section 6

Section 6 Provides:

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.

The right of privacy provisions in this section are distinct from those in § 7. *State v. Okubo*, 3 Haw. App. 396, 651 P.2d 494 (1984), *aff'd* 67 Haw. 197, 682 P.2d 79 (1984). The provisions of § 7 are discussed below, but it is clear that the provisions of § 6 only pertain to privacy in the informational and personal autonomy sense, rather than

the right to be free of unreasonable search and seizure. *State v. Lester*, 64 Haw. 659, 649 P.2d 346 (1982). Zimmerman's claims are properly construed as being claims under § 7, not under § 6.

Article I, § 7 of the Hawaii constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches, seizures, and invasions of privacy shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized or the communications sought to be intercepted.

The section is similarly worded to that of the fourth amendment of the United States Constitution, and United States Supreme Court cases guide courts in interpreting it. *State v. Kealoha*, 62 Haw. 166, 613 P.2d 645 (1980). The language "invasions of privacy" was added in 1968, and the right to privacy which it creates is limited to criminal cases. *State v. Okubo*, 3 Haw. App. 396, 651 P.2d 494 (1982), *aff'd*, 67 Haw. 197, 682 P.2d 79 (1984). Thus, Zimmerman appears unable to challenge the alleged interference with the privacy right created by this section in this civil case. Even if he could, however, he has not demonstrated a reasonable expectation of privacy under this section. To have such a reasonable expectation, a person must have exhibited an actual, subjective expectation of privacy, and the expectation must be one that society is prepared to recognize as reasonable. *State v. Ortiz*, 4 Haw. App. 143, 662 P.2d 517 (1983), *aff'd*, 67 Haw. 181, 683 P.2d 822 (1984). Zimmerman may have met the first prong of the test, but

he has fallen far short of the second prong. *See State v. Dias*, 62 Haw. 52 (1982) (squatters normally have no reasonable expectation of privacy, even in structures they build, unless landowner acquiesces to the squatting for a considerable period of time).

5. Count II – Conspiracy

Count II of the amended complaint alleges a conspiracy to violate Zimmerman's civil rights under the United States and Hawaii constitutions. Zimmerman states that he is not making a claim under 42 U.S.C § 1985 in this court, but rather, he is making a conspiracy claim under § 1983. That claim was discussed above. Since Zimmerman had no protected privacy, liberty, or property interest, the only possible conspiracy would be a conspiracy to lawfully arrest and charge trespassers. No claim under the Hawaii constitution is implicated in such a situation.

D. The Pendant Claims – Common Law Causes of Action

In the First Amended Complaint, Zimmerman alleged that his arrest on November 1, 1988 necessarily gave rise to the following common law causes of action against KS/BE:

1) Count III – false arrest
2) Count IV – false imprisonment
3) Count V – malicious prosecution
4) County VI – assault and battery
5) Count VII – excessive force

6) Count VIII – negligent and intentional infliction of emotional distress.

On June 6, 1991, in his Opposition to Defendants' Various Motions for Summary Judgment, Zimmerman withdrew Counts VI and VII for assault and battery and excessive force. Therefore, summary judgment in favor of KS/BE as to those two counts is granted.

The arrest was legal; therefore, summary judgment in favor of KS/BE as to Counts III and IV, for false arrest and false imprisonment, is granted.

KS/BE had no involvement with the prosecution of Zimmerman; therefore, summary judgment in favor of KS/BE as to Count V, for malicious prosecution, is granted.

Because none of the actions of KS/BE were unreasonable or outrageous, summary judgment in favor of KS/BE as to Count VIII, for negligent and intentional infliction of emotional distress, is also granted. *See Wong v. Panis*, 7 Haw. App. Adv. 414, 772 P.2d 695 (1989).

E. Zimmerman's Request to Amend His Complaint

Zimmerman's request in his Supplemental Opposition filed July 19, 1991, to amend his complaint is frivolous and is, therefore, denied. Such a request is dilatory and would prejudice all defendants. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1986).

F. Zimmerman's Request for Additional Discovery

Because further discovery in this case would be fruitless, Zimmerman's request in both his Opposition Memorandum filed June 6, 1991 and his Supplemental Opposition filed July 19, 1991, for additional time to do more discovery is denied. Furthermore, his affidavit fails to meet the requirements of Federal Rules of Civil Procedure, Rule 56(f), pursuant to the requirements in *California Union Insurance Co. v. American Diversified Savings Bank*, 914 F.2d 1271, 1278 (9th Cir. 1990); *Continental Maritime v. Pacific Coast Metal Trades*, 817 F.2d 1391, 1395 (9thCir. 1987); and *Hall v. State of Hawaii*, 791 F.2d 759, 761 (9th Cir. 1986).

IT IS HEREBY ORDERED that KS/BE's Motion for Summary Judgment on Plaintiff's First Amended Complaint is granted.

DATED: Honolulu, Hawaii, Sep. 03, 1991.

/s/ Alan C. Kay
UNITED STATES
DISTRICT JUDGE

Robert Lee Zimmerman v. Bishop Estate, et al.; Civil No. 90-00086 ACK; Order Granting Defendants Bishop Estate; Bishop Estate Trustees William Richardson, Henry Peters, Oswald Stender, Myron Thompson and Matsuo Takabuki; Elaine Dung; Peter Bertulfo and Paul Cathcart's (Unserved) Motion For Summary Judgment Filed April 29, 1991.